IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.R.RAMAN
&
THE HONOURABLE MR. JUSTICE V.K.MOHANAN

MONDAY, THE 10TH SEPTEMBER 2007 / 19TH BHADRA 1929

RFA.No. 574 of 2005()

OS.16/1997 of SUB COURT, KASARAGOD
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APPELLANTS/IST RESPONDENT.

A.NARAYANAN VAIDYAR, AGED 67 YEARS,
S/O.LATE RAMAN VAIDYAR, VAIDAR'S COMPOUND,
REIDING AT PRASEEDA, KARCHIKATTA ROAD, KUMBALA PO,
KOIPADY VILLAGE. (DIED)

ADDL.APPELLANTS 2 TO 4 IMPLEADED:

2. O.K. LEELA, AGED 61 YEARS, W/O. NARAYANAN VAIDYAR,
' PRASEEDA', KARINJIKATTA ROAD,
KUMBALA P.O., KASARAGOD DISTRICT.

3. PRAMEELAKUMARIM AGED 41 YEARS,, W/O. A.K. BALAN,
KOOVERI, CHAPPARAPADAVU (VIA), KANNUR DISTRICT.

4. PRAJULLA RAJ, AGED 37 YEARS,, S/O. NARAYANAN VAIDYAR,
`PRASEEDA', KARINJIKATTA ROAD,
KUMBALA P.O., KASARAGOD DISTRICT.

(ADDL.APPELLANTS 2 TO 4 ARE IMPLEADED AS PER ORDER DATED
30-8-2006 ON I.A.3433/2006.

BY ADV. SRI.M.SASINDRAN
SRI.T.P.ELDHO
SRI.M.SASINDRAN

RESPONDENTS:
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1. A.YESHODHA, AGED 61 YEARS,
D/O.LATE RAMAN VAIDYAR, W/O.LATE KRISHNAN VAIDYAR,
CHANDRALAYAM, MAVUNGAL, AJANOOR VILLAGE,
KASARAOD DISTRICT.

2. A.SEETHA, AGED 58 YEARS, (DIED).

3. A.LAKSHMI, AGED 55 YEARS, D/O.LATE
RAMAN VAIDYAR, W/O.O.K.KUNHIRAMAN MASTER,

NEAT VATENERY HOSPITAL, NADAKKAVU, NORTH
THRIKKARIPPUR, HOSDURG TALUK.

4. A.NARAYANI, AGED 48 YEARS, D/O.LATE
RAMAN VAIDYAR, W/O.P.SUKUMARAN, R/AT,. SMARANA,
ANAJAMPEEDIKA, VIA MALAYUR, CALICUT DISTRICT.

5. C.RAMAN, AGED 72 YEARS, S/O.APPU,
R/A.CHAITHANYA, KRISHNA NAGAR, P.O.KUMBALA.

6. MEENAKUMARI.C. AGED 45 YEARS,
W/O.NARAYANAN.V. SREE NILAYAM, ARAATH KUTHIRAKODE,
P.O.PANAYAL.

7. CHANDRIKA.C. AGED 43 YEARS,
W/O.KARUNAKARAN .V. KORAN NIVAS, NEAR ANGANVADI,
PATTATHANAM, BEKAL P.O.

8. MANOJ KUMAR.C.A GED 40 YEARS,
S/O.RAMAN MASTER, R/AT. CHAITHANYA,
KRISHNA NAGAR, P.O.KUMBALA.

9. BHANUMATHI.C. AGED 37YEARS,
W/O.RAGHAVAN, BINESH VIHAR,
ANGADIPADAVU, HOSANAGUDI P.O. BANGARA,
KASARAGOD.

10. GIRISHAN.C. AGED 35 YEARS,
S/O.RAMAN MASTER, CHAITHANYA, KRISHNA NAGAR.
P.O.KUMBALA.

11. PRASAD KUMAR.C. AGED 33YEARS,
S/O.RAMAN MASTER, R/A.CHAITHANYA, KRISHNA NAGAR,
P.O.KMBALA.

12. O.K.LEELA, AGED 56 YEARS,
W/O.A.NARAYANAN VAIDAR, VIADAR'S COMPOUND,
NOW R/A. PRASEEDA, KARICHIKATTA ROAD,
KUMBALA P.O. KOIPPADY VILLAGE.

13. DEVAKI, AGED 55 YEARS, W/O.LATE
JANARDHANA, R/A. VAIDAR'S COMPOUND, KARICHIKATTA
ROAD, KUMBALA P.O. KAIPPADY VILLAGE.

14. A.SHARI, AGE 36 YEARS, D/O.JANARDHANA
& W/O.CHANDRAN, NOW R/A. ELLATHIL VALAPPIL HOUSE,
MATTANNUR, P.O.MATTANNUR, KANNUR DISTRICT.

15. A.ASHA, AGED 33 YEARS, W/O.V.K.RAJAN,
WORKING AS CLERK, GOVERNMENT AYURVEDA COLLEGE,
PARIYARAM P.O. ARIYARAM, KANNUR DISTRICT.

16. A.PRAVEEN, AGED 32 YEARS, S/O.LATE
JANARDHANA, R/A.VAIDAR'S COMPOUND, KUMBALA,
KOIPPADY VILLAGE, KASARAGOD TALUK AND DISTRICT.

17. A.PRAMOD, AGED 30 EYARS, S/O.LATE
JANARDHANA, VAIDAR;S COMPOUND TEACHER,
G.W.L.P.S. EZHOME, P.O.EZHOME, KANNUR DISTRICT.

18. A.RAVINDRAN, AGED 49 YEARS, S/O.LATE
RAMAN VAIDAR, H.M.G.BANK, KUMBALA, VAIDAR'S
COMPOUND, KUMBALA PO, KOIPPADY VILLAGE, NOW
WORKING AS H.M.G.BANK, VALLAKADAVU BRANCH,
P.O.VALLAKKADAVU, NILESHWAR VIA, KASARAGOD DIST.

19. DR.A.CHAKRAPANI, AGED 46 YEARS,
S/O.LATE RAMAN VAIDYAR, DOCTOR, AMRITHA CLINIC,
BANDADKA, P.O. BANDADKA, KASARAGOD TALUK AND
DISTRICT.

20. A.KRISHNAN VIADAR, AGED 72 YEAFRS,
KOIPADY, P.O.KUMBALA, KASARAGOD DISTRICT.

21. AMBU MANIYANI, AGED 74 YEARS,
S/O.LATE MAHALAINA MANIYANI, COOLLIE,
YENIYANAPPA HOUSE,BELA VILLAGE, NEERCHAL POST,
KASARAGOD TALUK AND DISTRICT.

BY ADV. SRI.M.V.AMARESAN
SRI.V.N.RAMESAN NAMBISAN
SRI.M.V.AMARESAN
SRI.T.SETHUMADHAVAN
SRI.PUSHPARAJAN KODOTH
SRI.K.JAYESH MOHANKUMAR

THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD ON 10/09/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

ORDER ON I.A. 3599/2005 IN A.S.574/2005

DISMISSED.

SD/- P.R.RAMAN, JUDGE.
10-9-2007. SD/- V.K.MOHANAN, JUDGE.

//TRUE COPY//

P.R.RAMAN &
V.K.MOHANAN, JJ.

R.F.A.NO.574 OF 2005

Dated 10th September, 2007

JUDGMENT

Raman, J.

The Ist defendant in a suit for partition is the appellant herein. Pursuant to the preliminary decree passed, the Commissioner submitted his report and plans and subsequently, the final decree is also passed.

2. As per the preliminary decree, the property described in item Nos. 1 to 4 and 6 to 8 in A schedule of the plaint, the business conducted by the Ist defendant and the moveables as found by the commissioner in door No.X/281 in Kumbala panchayath wherein the Vaidyasala is conducted and noted by the Commissioner in Ext.C1 report were found to be partible. The business conducted therein is also partible. They were divided into 8 equal shares. Four shares to be allotted to the share of the plaintiffs together. One share to be allotted to the share of defendants 3 to 7 together. One share each to be allotted to defendants 8 and 9. No share is allotted to the first

defendant in the absence of payment of court fee. An account of the business run in door No.X/281 is directed to be taken. The share of profits from the date of suit till delivery of possession is ordered to br paid to the co-owners. The shop building and the business therein shall be allotted to the share of the first defendant in equity. The house situated in item No.2 of plaint A schedule and the house site shall be allotted to the share of defendants 3 to 7. The claim of equity by other sharers are left open to be decided in the final decree proceedings. The claim and liability for future profits and the quantum of the same also is left open to be decided in the final decree proceedings. It was found that item No.5 of plaint A schedule properties, plaint B schedule properties and the moveables found by the Commissioner in house No.6/46 of Kumbla Panchayath are found not available for partition. The cost of the plaintiffs and defendants 1 to 9 shall come out of the estate. The plaintiffs are liable to pay costs of the suit to defendants 10 and 11 and those who paid court fee are entitled to apply for final decree for partition of

the properties into metes and bounds.

3. The preliminary decree became final. Thereafter the commissioner filed his report, accounts, share list and plan which are marked as Exts.C1 to C7. The Ist defendant was examined as RW-1. Exts.B1 to B3 were marked on his side. Ist defendant/appellant contended that the entire 40 cents with house should have been allotted to his share. According to him, the commissioner has gone wrong in not allotting R.S.No.160/6A. He disputed the valuation of the house with door No.VI/133 as excessive and depreciation allowed is too low. It is further contended that the value of the land shown is excessive and arbitrary. According to him, the average income will not be more than Rs.25/- per day. Similarly, the income estimated from D Schedule is excessive. He has produced Ext.B2 series, the basic tax receipts for the period from 1989 to 1997 and Ext.B2 series from 1999 to 2005 and contended that he is entitled to reimburse for these payments. He has also produced Ext.B3 series building tax receipts for the period from 1998 to 2004.

4. The claim for reimbursement based on tax receipts was turned down by the court below as these properties having found partible as they are co-owners and therefore payment of basic tax by the appellant is only for and on behalf of the other co-owners as well.

5. The court below overruled the objection regarding valuation of house, valuation of land etc., as according to the court, the opinion rendered by the Commissioner in his first report was tenable and the Commissioner has valued the house with the help of Civil Engineer as is seen from Ext.C6.

6. The court below found that there is no irregularity or injustice caused to any of the parties in allotment of their respective shares. According to the court below, the Commissioner has acted on equitable principles. The division of plot and valuation adopted by the Commissioner are just and proper. The Commissioner's report, accounts share list and plan were accepted by the court below and final decree was passed accordingly.

7. Learned counsel appearing for the appellant

contended that the allowance of claim for reimbursement of basic tax is wrong. We have already mentioned that the appellant cannot successfully claim any reimbursement of basic tax paid because the payment made by him was only for and on behalf of the other co-owners as well. Hence, we do not find any merit in this contention.

9. As regards non allotment of plot R.S.160/6A is concerned, it has to be seen that the Commissioner had prepared 4 plans. The commissioner prepared plan in respect of the land in Koipady village situated in R.S.160/6 while allotting shares A to H, the Commissioner allotted one plot each to all the sharers. R.S.160/6B in which the house is situated on equity have been allotted to the appellant. RS 160/6A is allotted to the Ist plaintiff which is only an extent of 17 cents, whereas RS No.160/6B is 23 cents. Even though the appellant was given more extent obviously because the house is situated and for the purpose of beneficial enjoyment of the property, a larger plot was given to the appellant. The claim of the appellant that he should be given the entire 40 cents inclusive of

R.S.160/6 A in no way appeal to us as reasonable. The Commissioner has equally distributed lands to all the sharers in RS 160/6 of Koipady village. We find that equitable distribution is done to all the parties. Hence this contention is repelled.

9. The contention advanced by the learned counsel for the appellant that the extent of 3 cents of property in Kumbala town was valued at 25,000/- per cent is too high. These 3 cents has been allotted to the share of the appellant. So, while valuing the share value, the share value has been taken as 75,000/- in respect of the property. According to him, the centage value in Kumbala town will not fetch such huge amount. But in the absence of acceptable evidence, we are not able to accept this contention. The Commissioner has valued the property on an estimate in the absence of concrete evidence. The appellant has not produced any evidence to show that the value of the property is less than what is stated by the commissioner. Mere ipse dixit of the appellant cannot be taken as a conclusive proof to show that the property will

fetch lesser value. This contention is rejected.

10. The only other contention that remains to be considered is regarding the valuation of the profit earned from the Vaidyasala conducted by the appellant herein. Commissioner has fixed Rs.250/- per day as profit earned from the business. According to the appellant, the valuation of profit from the business made by the Commissioner is without any basis. At the same time, the appellant who has been conducting business all these years could have produced the books of accounts and if he has produced the same, the court could have examined whether the income assessed by the Commissioner is excessive or high. No attempt is made in this regard to disprove the estimation of the income from the business. However, considering the fact that the appellant will have to account for the profit earned from all these years and in the absence of any specific data based on which the Commissioner has assessed income, after hearing both sides, we fix the income at Rs.225/- per day. The valuation of the share will be made accordingly. The appellant is not entitled for any

other relief in this appeal. The appeal is allowed to the limited extent as above. The court will recalculate the share value and the amount to be paid by the respective parties based on the reduction of the income from Rs.250/- to Rs.225/-. In all other respects, the finding of the court below is confirmed.

P.R.RAMAN, JUDGE.

V.K.MOHANAN JUDGE.

Kvm/

V.K.MOHANAN, J.

No....

Judgment/Order

Dated: